Filed 5/10/19 Mason v. Lion Raisins, Inc. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JEREMY MASON,

Plaintiff and Respondent,

v.

LION RAISINS, INC.,

Defendant and Appellant.

F076202

(Super. Ct. No. 15CECG00733)

OPINION

APPEAL from orders of the Superior Court of Fresno County. Mark W. Snauffer, Judge.

Keith C. Rickelman and Bertram T. Kaufmann for Defendant and Appellant.

Lawyers for Justice, Edwin Aiwazian, Arby Aiwazian, Elizabeth Parker-Fawley; Girardi/Keese and V. Andre Sherman for Plaintiff and Respondent.

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Plaintiff Jeremy Mason brought this class action lawsuit against his former employer, defendant Lion Raisins, Inc., asserting statutory claims for alleged violations of the Labor Code relating to wages, overtime, rest and meal periods, wage records, and other related statutory claims. In response, after first participating in the litigation of the

case for a substantial period of time, defendant filed (i) a motion for summary judgment and (ii) a petition to compel arbitration, contending in both instances that plaintiff failed to follow the grievance and arbitration procedure set forth in a collective bargaining agreement (CBA) applicable to plaintiff's employment. The trial court denied both motions because, among other reasons, the relevant language of the CBA did not reflect an agreement to arbitrate plaintiff's *statutory* claims. Defendant appeals. As more fully explained below, we agree with the trial court's conclusion that the CBA did not require arbitration of plaintiff's causes of action for violations of statutorily protected rights. For this reason, among others, we hold the trial court correctly denied the motion for summary judgment and the petition to compel arbitration, and both orders are hereby affirmed.

FACTS AND PROCEDURAL HISTORY

Nature of Plaintiff's Action

Plaintiff's original class action complaint for damages was filed on March 4, 2015. For purposes of the present appeal, the relevant pleading is plaintiff's second amended class action complaint for damages, filed on September 9, 2015 (the second amended complaint). In the second amended complaint, plaintiff asserts on his own behalf and on behalf of the purported class members, a number of specific violations of the Labor Code by defendant, including as follows: unpaid overtime (Lab. Code, §§ 510, 1198), unpaid meal period premiums (Lab. Code, §§ 226.7, 512), unpaid rest period premiums (Lab. Code, § 226.7), unpaid minimum wages (Lab. Code, §§ 1194, 1197, 1197.1), final wages not timely paid (Lab. Code, §§ 201, 202), noncompliant wage statements (Lab. Code, § 226), failure to keep required payroll records (Lab. Code, § 1174), and unreimbursed business expenses (Lab. Code, §§ 2800, 2802). Based on the above violations, plaintiff also asserted a violation of California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.). The prayer for relief sought, among other things, declaratory relief,

recovery of damages resulting from the violations, statutory penalties and statutory attorney fees.

Defendant's Motion for Summary Judgment

On September 14, 2016, defendant filed its motion for summary judgment or in the alternative for summary adjudication (motion for summary judgment). Defendant's motion for summary judgment was made on the ground that plaintiff's claims were required to be addressed through the grievance and arbitration procedure set forth in a CBA, and that, by failing to do so, plaintiff had waived his right to present his claims in any forum.

Defendant's moving papers in support of the motion for summary judgment included two declarations. The declaration of Raul Gomez, the plant superintendent for defendant, stated that he had never received a grievance from plaintiff, the submittal of which was required to initiate the grievance and arbitration procedure. The declaration of Anthony Rangbar, who was the maintenance manager for defendant and plaintiff's immediate supervisor while plaintiff was employed by defendant,[1] asserted that plaintiff "and the other plant mechanics were governed by the terms of a collective bargaining agreement (the 'CBA') between Lion Raisins and General Teamsters Union Local 431." Rangbar purported to attach a true and correct copy of the CBA. Rangbar further stated in his declaration that, under the CBA, plaintiff "must orally present a grievance to me within three working days of its occurrence" and "[plaintiff] never presented any grievance to me."

On November 22, 2016, plaintiff opposed the motion for summary judgment, arguing among other things that defendant failed to meet its initial burden as the moving party because the CBA submitted by Rangbar was not in effect during plaintiff's period

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[1] Rangbar notes that plaintiff "worked less than 60 days for Lion Raisins as a Plant Mechanic between March 5, 2012 and May 18, 2012, when he quit."

of employment, nor was it properly authenticated or proven to apply to plaintiff's employment based on personal knowledge. In any event, even assuming the CBA did apply, plaintiff argued that defendant failed to establish plaintiff's statutory claims came within the scope of the CBA's grievance and arbitration procedure, and also that such procedure, if applicable, was unconscionable. Additionally, plaintiff filed certain evidentiary objections, including an objection that the CBA was not adequately authenticated by Rangbar's declaration.

On December 1, 2016, defendant filed its reply papers. The reply brought forward a more recent version of the CBA, which was purportedly applicable during plaintiff's employment, along with the declaration of defendant's human resources manager, Eric Vollmer, who sought to authenticate the updated CBA. Vollmer asserted that the packing plant where plaintiff was employed was a "union shop," and he purported to attach a copy of the CBA in effect from 2008 through 2012. We note that the CBA wording relating to the grievance and arbitration procedure was the same in the CBA submitted by Vollmer as in the prior version submitted by Rangbar. The trial court did not consider the Vollmer declaration, presumably because it was new evidence submitted in the reply papers. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537–1538 [new evidence not permitted with reply papers on summary judgment, absent exceptional circumstances and opportunity for other party to respond].)

After hearing the motion for summary judgment, the trial court issued its order denying the motion on December 16, 2016. The trial court denied the motion for two reasons: (i) defendant failed to present sufficient evidence to authenticate the CBA and to show that plaintiff was subject to the grievance and arbitration procedure set forth therein, and (ii) even assuming the CBA applied, defendant also failed to show that plaintiff was required by the express terms of the CBA to submit his statutory claims to the CBA's grievance and arbitration procedure. In support of the latter ground for denial of the motion, relying on *Wright v. Universal Maritime Service Corp.* (1998) 525 U.S.

70, 79–80 (*Wright*), and *Vasquez v. Superior Court* (2000) 80 Cal.App.4th 430, 434 (*Vasquez*), the trial court observed that the CBA did not contain a clear and explicit waiver of plaintiff's right to pursue the statutory claims in a judicial forum.

Defendant's Petition to Compel Arbitration

On April 17, 2017, four months after the trial court denied its motion for summary judgment, defendant filed a petition to compel arbitration of plaintiff's claims asserted in the second amended complaint. The petition was made on the ground the CBA required all of plaintiff's claims be submitted to and resolved by binding arbitration. As was the case in the motion for summary judgment, defendant's petition relied on the grievance and arbitration procedure specified in the CBA (hereafter the arbitration provision). According to the terms of the arbitration provision, "[a]ny controversy or interpretation arising out of the application of this [CBA] shall be handled by" the grievance and arbitration procedure that culminated in binding arbitration. Defendant filed an expanded declaration of its maintenance manager who was also plaintiff's former supervisor, Anthony Rangbar, in an effort to authenticate the CBA and to show it applied to plaintiff.

On May 23, 2017, plaintiff filed opposition to the petition to compel arbitration. Plaintiff's opposition argued that defendant failed to demonstrate the CBA was applicable to plaintiff's employment, and, in any event, failed to show that the arbitration provision in the CBA covered plaintiff's statutory claims. Additionally, plaintiff argued that defendant waived any arbitration rights by its unreasonable delay and aggressive litigation activity prior to filing the petition. Finally, plaintiff argued the arbitration provision, even if otherwise applicable, was unconscionable. Plaintiff's counsel also attached a copy of a letter sent to defendant's president prior to filing suit, which letter had requested "[a]ny and all arbitration agreements signed by [plaintiff] … [or] dispute resolution policies." The response from defendant did not include a copy of the CBA.

Following the hearing of the motion, the trial court took the matter under submission and subsequently issued its order denying the petition on July 13, 2017. The

trial court denied the petition to compel arbitration on essentially the same grounds as it had articulated in previously denying the motion for summary judgment, including that (i) defendant failed to adequately authenticate the CBA and prove its application to plaintiff's employment, and (ii) the CBA's arbitration provision did not clearly or explicitly indicate the parties intended to arbitrate the statutory claims as required by *Wright, supra,* 525 U.S. 70, 79–80, and *Vasquez, supra,* 80 Cal.App.4th 430, 434. Further, the trial court denied the petition for the additional reason that defendant waived its right to pursue arbitration based on its unreasonable delay and its extensive litigation activity in the case prior to filing the petition.

Defendant's Appeal

On August 14, 2017, defendant timely filed a notice of appeal from the trial court's order denying its petition to compel arbitration, which is an appealable order pursuant to Code of Civil Procedure section 1294, subdivision (a).

Defendant's notice of appeal also sought review of the trial court's order denying its motion for summary judgment, even though not itself an appealable order, because it constituted an intermediate ruling involving the merits of the issues that were at stake in, and potentially affected, the petition to compel arbitration. Code of Civil Procedure section 1294.2 provides in relevant part as follows: "Upon an appeal from any order or judgment under this title, the court may review the decision *and* any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the order or judgment appealed from, or which substantially affects the rights of a party." (Italics added.) It appears that section 1294.2 is applicable and will allow our review of the intermediate ruling denying the motion for summary judgment along with the appealable order specifically recognized by statute—i.e., the order denying the petition to compel arbitration. As will be seen, our answer to the question of whether the CBA required arbitration of plaintiff's statutory claims will establish the correctness of both orders denying relief.

DISCUSSION

I. Standard of Review

" ' " 'There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]' " ' " (*Avila v. Southern California Specialty Care, Inc*. (2018) 20 Cal.App.5th 835, 839–840.) Here, we review de novo the legal question of whether plaintiff was required under the terms of the CBA and applicable law to arbitrate his statutory claims. (See *Muro v. Cornerstone Staffing Solutions, Inc*. (2018) 20 Cal.App.5th 784, 789–790; *Omar v. Ralphs Grocery Co*. (2004) 118 Cal.App.4th 955, 959.)

Summary judgment is appropriate only if all of the papers submitted show there is no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) On appeal, we independently evaluate the correctness of the trial court's ruling. (*Havstad v. Fidelity National Title Ins. Co*. (1997) 58 Cal.App.4th 654, 658.) As to rulings on evidentiary objections, where the basis of the ruling was lack of foundation or conclusory testimony, we apply the abuse of discretion standard of review. (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226.)

Finally, to the extent our determination requires the interpretation of the meaning of any written contract, that question of law is reviewed de novo on appeal. (*Hess v. Ford Motor Co*. (2002) 27 Cal.4th 516, 527; *Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865.)

II. The CBA Did Not Require Arbitration of Plaintiff's Statutory Claims

The parties dispute whether defendant properly authenticated the CBA. We will leave that evidentiary issue until a later part of this opinion. At this point, assuming for

the sake of argument that the CBA has been adequately substantiated, we address the crucial issue of whether, under applicable law, the CBA in this case requires plaintiff to arbitrate his statutory claims. We conclude it does not.

The right to arbitration is a matter of contractual consent and depends on whether an agreement to arbitrate exists. (Code Civ. Proc., § 1281.2.) Fundamental to this inquiry is whether the parties have agreed to arbitrate the dispute under consideration. (*Cortez v. Doty Bros. Equipment Co*. (2017) 15 Cal.App.5th 1, 11 (*Cortez*).) Thus, " ' "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." ' [Citations.]" (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US*), *LLC* (2012) 55 Cal.4th 223, 236.) In determining whether an agreement to arbitrate covers the parties' dispute, courts apply state contract law while giving due regard to the federal policy favoring arbitration. (*Id.* at p. 236.)

The unique type of contract under consideration here is a CBA. A CBA is an agreement between an employer and a union and *may* be construed to waive the rights of union members (i.e., employees) even without explicit, individual consent of each member. (*Rymel v. Save Mart Supermarkets, Inc*. (2018) 30 Cal.App.5th 853, 859.) For example, in a CBA a union representative may agree on behalf of the represented employees that they must arbitrate controversies relating to the interpretation or enforcement of the terms of the CBA. (*Cortez*, *supra*, 15 Cal.App.5th at p. 11.) Generally speaking, "when a CBA includes an arbitration provision, contractual matters under a CBA are presumed arbitrable; that is, arbitration must be granted as long as the CBA is reasonably susceptible to an interpretation in favor of arbitration. [Citation.] [¶] However, the presumption of arbitration in a CBA does not apply to *statutory* violations. [Citations.]" (*Id*. at pp. 11–12, italics added.) In fact, as explained more fully below, a CBA will not be deemed to waive an employee's right to pursue statutory claims in a judicial forum unless that waiver is clear and unmistakable.

In *Wright, supra*, 525 U.S. at pages 79-81, the Supreme Court addressed the issue of whether a general arbitration provision in a CBA was sufficient to require an employee to arbitrate a claim based on statutory rights under the Americans with Disabilities Act of 1990 (the ADA). While acknowledging that ordinarily a presumption of arbitrability applies to contractual disputes arising out of a CBA, *Wright* concluded the presumption did not apply to statutory violations. (*Wright, supra,* 525 U.S. at pp. 78–79.) *Wright* explained that an employee's statutory claim "ultimately concerns not the application or interpretation of any CBA, but the meaning of a … statute" and of statutory rights "distinct from" the CBA. (*Ibid*.) Moreover, *Wright* also held that any CBA requirement that an employee arbitrate statutory claims "must be particularly clear." (*Id*. at p. 79.) That is, a union-negotiated waiver of employees' statutory rights to a judicial forum must be "clear and unmistakable." (*Id*. at p. 80.) *Wright* would not infer from a general arbitration provision in a CBA relating to contractual disputes that the parties intended to require arbitration of statutory violations or waive the employee's right to pursue statutory remedies in a judicial forum; rather, any intention to arbitrate statutory claims would have to be " ' "explicitly stated." ' " (*Ibid*.; accord, *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247, 258 [the agreement to arbitrate statutory claims must be " 'explicitly stated' " in the CBA].)

In *Vasquez, supra,* 80 Cal.App.4th 430, the Second District Court of Appeal, Division Five, followed *Wright* in a case involving statutory causes of action under California's antidiscrimination law (i.e., Gov. Code, § 12940 et seq.) for national origin discrimination as well as claims under the ADA. (*Vasquez,* at pp. 432–434.) The CBA in *Vasquez* required that any disputes arising out of the CBA be resolved by a grievance and arbitration procedure. The plaintiff filed his action on the statutory claims in court without ever presenting the claims as a grievance or submitting them to arbitration. After the trial court issued an order compelling arbitration of plaintiff's statutory claims, the plaintiff filed a petition for writ of mandate to the Court of Appeal. *Vasquez* granted the

writ petition, vacated the trial court's order compelling arbitration and directed the trial court to enter a new order denying the motion. (*Id*. at pp. 432, 437.)

In reaching that result, *Vasquez* noted the question presented on appeal was whether arbitration of the statutory claims was required under the CBA. (*Vasquez, supra*, 80 Cal.App.4th at p. 432.) In answering that question, *Vasquez* expressly followed *Wright*, summarizing *Wright's* salient principles as follows: (i) the presumption of arbitrability of a dispute under a CBA is not applicable to statutory violations; (ii) a requirement to arbitrate statutory claims in a CBA must be particularly clear; (iii) that is, a union-negotiated waiver of employees' statutory rights to a judicial forum must be *clear and unmistakable*; (iv) courts will not infer from a general contractual provision in a CBA that the parties intended to waive a statutorily protected right unless the undertaking is *explicitly stated*; and (v) the right to a judicial forum for statutory claims is of sufficient importance to be protected against a less-than-explicit union waiver in a CBA. (*Vasquez, supra*, 80 Cal.App.4th at p. 434, citing *Wright*.) Further, *Vasquez* held that in determining whether there has been a sufficiently explicit waiver, courts look to the generality of the arbitration clause, explicit incorporation of statutory requirements, and the inclusion of specific statutory provisions. (*Vasquez*, at p. 434.) "The test is whether a collective bargaining agreement makes compliance with the statute a contractual commitment subject to the arbitration clause." (*Ibid.*)

Applying the above principles to the case before it, where the CBA provided in a broad and nonspecific manner that " 'all grievances or disputes arising … over the interpretation or application of the terms of this [CBA]' " shall be settled by the grievance and arbitration procedure set forth in the CBA (*Vasquez, supra,* 80 Cal.App.4th at p. 433), *Vasquez* concluded there had been no clear and unmistakable waiver of the employees' rights to a judicial forum for their statutory claims of employment discrimination. (*Id*. at p. 436.) Accordingly, *Vasquez* held that the plaintiff had the right

to a judicial forum for those statutory claims and the motion to compel arbitration should not have been granted. (*Ibid.*)

Although both *Wright* and *Vasquez* involved statutory claims for violation of antidiscrimination laws, the same principles have been followed where other statutory violations were alleged, including violations of Labor Code provisions. For example, in *Vasserman v. Henry Mayo Newhall Memorial Hospital* (2017) 8 Cal.App.5th 236 (*Vasserman*), the plaintiff sued her former employer for violations of the Labor Code relating to meal and rest breaks, unpaid wages, and unpaid overtime compensation. (*Vasserman,* at p. 239.) Applying *Wright* and *Vasquez*, the Court of Appeal in *Vasserman* held the CBA did not contain an explicitly stated, clear and unmistakable waiver of the right to a judicial forum for the statutory Labor Code claims. (*Vasserman,* at pp. 239, 246.) The CBA in that case stated that arbitration was applicable to " 'any complaint or dispute arising out of the interpretation or application of … this [CBA].' " (*Id*. at p. 247.) The arbitration provision made no mention of the Labor Code or any other statute, it did not discuss individual statutory rights, and it did not mention waiver of a judicial forum. Although there were other provisions in the CBA discussing issues such as overtime compensation and meal and rest periods, such discussion of those topics and the inclusion of some general provisions in the CBA on the same did not amount to a contractual commitment to comply with any statutory provisions of the Labor Code or a clear and unmistakable waiver of a judicial forum for such statutory claims. (*Vasserman,* at pp. 248–250.)

Similarly, in *Cortez, supra,* 15 Cal.App.5th 1, the Court of Appeal applied the *Wright*/*Vasquez* analysis to a CBA arbitration provision where the plaintiff sued his former employer for violations of wage and hour provisions of the Labor Code. *Cortez* held that some of the plaintiff's statutory claims in that case were subject to the CBA's arbitration clause because the clause had clearly and unmistakably referenced claims arising under wage order No. 16-2001, which would be understood to involve certain

Labor Code enforcement provisions. (*Cortez*, *supra*, 15 Cal.App.5th at pp. 4–6, 12–15.) However, other statutory claims were not arbitrable under the *Wright*/*Vasquez* test. (*Cortez,* at pp. 14–15.) Several additional cases further confirm that the "clear and unmistakable" standard of *Wright*/*Vasquez* applies to CBA arbitration provisions where the employee has asserted Labor Code violations. (See, e.g., *Hoover v. American Income Life Ins. Co*. (2012) 206 Cal.App.4th 1193, 1208 [following *Vasquez*, holding statutory claims under Lab. Code were not subject to the CBA's arbitration provision because that provision did not clearly reflect an agreement to arbitrate the plaintiff's statutory claims, as distinct from contractual claims under the CBA]; *Flores v. Axxis Network & Telecommunications, Inc*. (2009) 173 Cal.App.4th 802, 806–808 [holding that prevailing wage law claim under Lab. Code was not subject to arbitration provision in CBA under principles of *Wright* and *Vasquez*, and also because CBA's wording indicated prevailing wage claims would not be subject to arbitration]; *Wawock v. CSI Electrical Contractors, Inc*. (9th Cir. 2016) 649 Fed.Appx. 556, 558 [an employee's California law statutory claims for right to reimbursement of certain expenses were held to be not subject to CBA's general arbitration provision, noting further that "every court to have discussed the issue has recognized *Wright's* application to other statutory claims" besides discrimination]; see also *Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1465 [citing established rule that "a [CBA] validly waives a union member's rights to litigate federal or state claims in a judicial forum only if the waiver is clear and unmistakable," the court held in a nonarbitration case that when a CBA purports to include a negotiated waiver of rights under Lab. Code, § 227.3 regarding vacation pay, it must likewise be clear and unmistakable].)

Based on the foregoing overview of the law, we conclude it is well established that *Wright* and *Vasquez* and their progeny are applicable where, as here, a union-negotiated CBA contains an arbitration provision and the employee/plaintiff has elected to pursue his or her statutory claims in court. Under California case law, which has specifically

applied the reasoning set forth in *Wright* to state law statutory claims, employees covered by a CBA will not be required to arbitrate claims based on statutory violations and will not be found to have waived their right to pursue such statutory claims in a judicial forum *unless* such a commitment is clearly and unmistakably reflected in the terms of the CBA. (*Vasserman, supra,* 8 Cal.App.5th at pp. 244–246; *Vasquez, supra,* 80 Cal.App.4th at pp. 433–436.)

Applying the above standard, we conclude the CBA in the present case does not clearly and unmistakably require covered employees to submit their Labor Code claims to the binding grievance and arbitration procedure contained in the CBA. The arbitration provision states that it applies to "[a]ny controversy or interpretation *arising out of the application of this Agreement* …." (Italics added.) Thus, according to the express terms of the arbitration provision, it is applicable only to disputes relating to application of the CBA itself—that is, to *contractual* matters. Nowhere in the arbitration provision of the CBA does it state that it applies to claims based on Labor Code violations, or to statutory rights or statutory claims of any sort. Although elsewhere in the CBA some general provisions are set forth relating to overtime and meal and break periods, these general provisions do not refer to the applicable Labor Code sections, nor do they make compliance with the Labor Code "an express contractual commitment." (*Vasquez, supra,* 80 Cal.App.4th at pp. 434–436; *Vasserman, supra,* 8 Cal.App.5th at p. 250.) Further, the CBA does not include provisions for minimum wage, the timing of payment of wages, or the contents of wage statements or payroll records, which were additional statutory claims asserted by plaintiff in his second amended complaint, much less does the CBA refer to any statutory provisions of the Labor Code relating to such matters. We conclude there was no agreement to arbitrate the statutory claims at issue in this case, and therefore, the trial court correctly denied defendant's motion for summary judgment and petition to compel arbitration.

We briefly address defendant's argument that, despite the CBA's failure to provide for the arbitration of employees' statutory claims, such claims should still have been ordered by the trial court into arbitration pursuant to the Federal Arbitration Act (see 9 U.S.C. § 1 et seq., the FAA). Defendant maintains that the trial court's refusal to order arbitration in this case was contrary to the purposes of the FAA, which law is designed to ensure the enforcement of private arbitration agreements and preempts impermissible state law obstacles to the accomplishment of that purpose. (See, e.g., *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 344–352 [FAA preempts state laws that interfere with fundamental attributes of arbitration or that are inconsistent with the FAA's core purposes]; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 626 [under FAA, doubts concerning scope of arbitrable issues resolved in favor of arbitration]; *Perry v. Thomas* (1987) 482 U.S. 483, 489–491 [state law precluding arbitration of certain types of claims preempted by FAA].)

We find no conflict with the FAA's objectives here. The principal purpose of the FAA is to " 'ensur[e] that private arbitration agreements are enforced according to their terms.' [Citations.]" (*AT&T Mobility LLC v. Concepcion, supra,* 563 U.S. at p. 344.) The present case does not involve the enforceability of an agreement to arbitrate, but the lack of any agreement in the CBA to arbitrate *statutory* claims. That is, this case turns upon the language of the arbitration provision and of the CBA in which it is found, the plain meaning of which was never in doubt—i.e., the arbitration provision applied only to contractual, not statutory claims.

Of course, in addressing the precise question of whether the CBA's arbitration provision encompassed plaintiff's statutory claims, we have applied the interpretive principles relevant to that question as declared by the United States Supreme Court in *Wright* (subsequently followed in *14 Penn Plaza LLC v. Pyett, supra,* 556 U.S. at pp. 258, 274 [CBA's arbitration coverage of statutory claims must be " 'explicitly stated' " or "clearly and unmistakably" provided]), which principles have been adopted by California

appellate courts in decisions such as *Vasquez, Vasserman* and *Cortez*, as discussed hereinabove. Moreover, our appellate courts have continued to follow *Wright* and *Vasquez* even while acknowledging the FAA's general applicability to the particular CBA arbitration provision(s) under consideration. (See, e.g., *Cortez, supra*, 15 Cal.App.5th at p. 16, fn. 4; *Mendez v. Mid-Wilshire Health Care Center* (2013) 220 Cal.App.4th 534, 540, fn. 2, 546–547.) Defendant has failed to show that *Wright* or *Vasquez* or their progeny have been disapproved or are no longer good law under the FAA, and we fail to see any inherent conflict between those cases and the purposes of the FAA. We therefore reject as unsupported defendant's cursory claim that the FAA requires a different result in this case. (See *Mendez v. Mid-Wilshire Health Care Center, supra*, 220 Cal.App.4th at pp. 546–547 [rejecting argument that U.S. Supreme Court's FAA case law impliedly overruled *Vasquez*, while noting further that state and federal courts continue to apply *Wright* and *Vasquez*]; see also *City of Los Angeles v. Superior Court* (2013) 56 Cal.4th 1086, 1103 [discussing *Wright* and presupposing its legal viability, but distinguishing it since no statutory claim involved].)[2]

In summary, defendant's arguments that *Wright* and *Vasquez* should not be applied here are unpersuasive or unsupported. As noted above, we hold the CBA in this case did not contain an agreement requiring arbitration of plaintiff's statutory claims,

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[2] Additionally, we agree with plaintiff's position that cases relating to arbitration agreements that were not contained in a CBA and which did not involve the precise issue of whether employees' statutory claims were required to be arbitrated under the CBA's arbitration provision are distinguishable. (See *Vasserman, supra*, 8 Cal.App.5th at p. 245, fn. 4, citing *Wright, supra*, 525 U.S. at pp. 80–81 and *Vasquez, supra*, 80 Cal.App.4th at pp. 433–436 [noting recognized distinction on this issue between a CBA and an individual arbitration agreement].) Defendant's opening brief makes perfunctory references to a number of such cases that are distinguishable on this ground. (E.g., *Khalatian v. Prime Time Shuttle, Inc.* (2015) 237 Cal.App.4th 651; *Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676; *Nelsen v. Legacy Partners Residential, Inc*. (2012) 207 Cal.App.4th 1115.)

which means that the trial court properly denied defendant's motion for summary judgment and petition to compel arbitration.

III. Waiver of Right to Arbitrate

The trial court denied defendant's petition to compel arbitration on the additional ground that defendant waived any right it may have had to arbitrate the dispute by engaging in litigation for approximately two years prior to bringing its petition. Defendant challenges the trial court's ruling, arguing that no waiver occurred because there was no prejudice caused by the litigation. We conclude the trial court did not err in its finding of waiver.

Code of Civil Procedure section 1281.2 provides that one ground for denying a petition to compel arbitration is that "[t]he right to compel arbitration has been waived by the petitioner …." Although the concept of "waiver" often denotes the voluntary relinquishment of a known right, it can also refer to the loss of a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to relinquish the right. (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1195, fn. 4 (*St. Agnes Medical Center*).) "In the arbitration context, '[t]he term "waiver" has also been used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost.' [Citation.]" (*Id.* at p. 1195, fn. 4.) Because of the strong policy favoring arbitration agreements under both state law and the FAA, "waivers are not to be lightly inferred and the party seeking to establish a waiver bears a heavy burden of proof." (*St. Agnes Medical Center,* at p. 1195.)

No single test delineates the nature of the conduct that will constitute a waiver of arbitration. (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1195.) " '… California courts have found a waiver of the right to demand arbitration in a variety of contexts, ranging from situations in which the party seeking to compel arbitration has previously taken steps inconsistent with an intent to invoke arbitration [citations] to instances in which the petitioning party has unreasonably delayed in undertaking the procedure.

[Citations.] The decisions likewise hold that the "bad faith" or "willful misconduct" of a party may constitute a waiver and thus justify a refusal to compel arbitration. [Citation.]' " (*Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, 374–375, quoting *Davis v. Blue Cross of Northern California* (1979) 25 Cal.3d 418, 425–426.)

As further guidance, our high court has stated that the following factors are relevant to the waiver inquiry: " ' " '(1) whether the party's actions are inconsistent with the right to arbitrate; (2) whether "the litigation machinery has been substantially invoked" and the parties "were well into preparation of a lawsuit" before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) "whether important intervening steps [e.g., taking advantage of judicial discovery procedures not available in arbitration] had taken place"; and (6) whether the delay "affected, misled, or prejudiced" the opposing party.' " ' " (*Iskanian v. CLS Transportation Los Angeles, LLC, supra*, 59 Cal.4th at p. 375.)

The fact that the party petitioning for arbitration has participated in litigation of the dispute, short of a determination of the merits, does not by itself constitute a waiver. (*Iskanian v. CLS Transportation Los Angeles, LLC, supra*, 59 Cal.4th at p. 375, citing *St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1203.) Rather, a waiver based on participation in litigation will only be found if the litigation results in *prejudice* to the party opposing arbitration. (*St. Agnes Medical Center, supra*, 31 Cal.4th at p. 1203.) In this context, the mere fact that the party opposing arbitration has incurred court costs and legal expenses is not enough, by itself, to show prejudice. (*Ibid.*) Instead, for litigation activity to be deemed prejudicial, it generally must have resulted in prejudice relating to the nature of the arbitration remedy and the statutory purposes for it: "[C]ourts assess prejudice with the recognition that California's arbitration statutes reflect ' "a strong

public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution" ' and are intended ' "to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing." ' [Citation.] Prejudice typically is found only where the petitioning party's conduct has substantially undermined this important public policy or substantially impaired the other side's ability to take advantage of the benefits and efficiencies of arbitration." (*Id*. at p. 1204.) Obvious examples of such prejudice include where (i) the petitioning party used the judicial discovery process to gain information about the other side's case that could not have been gained in arbitration; (ii) a party unduly delayed and waited until the eve of trial to seek arbitration; or (iii) the lengthy nature of the delays associated with the petitioning party's attempts to litigate resulted in lost evidence. (*Ibid*.)

While delay and expense from litigation do not by themselves constitute prejudice, unreasonable or unjustified delay combined with substantial expenditure of time and money may, in particular cases, support the conclusion that prejudice occurred depriving the parties of the benefits of arbitration. (*Iskanian v. CLS Transportation Los Angeles, LLC, supra,* 59 Cal.4th at p. 377; accord, *Sprunk v. Prisma LLC* (2017) 14 Cal.App.5th 785, 809 [consideration of expenditure of time and money permitted in determining prejudice where delay was unreasonable or unjustified]; *Adolph v. Coastal Auto Sales, Inc*. (2010) 184 Cal.App.4th 1443, 1451–1452 [prejudice found where the defendant not only waited six months after the complaint was filed, but interposed two demurrers, uncooperatively contested plaintiff's discovery efforts, and only when litigation no longer seemed to be working to its advantage, petitioned to compel arbitration about three to four months prior to the trial date]; see *Burton v. Cruise* (2010) 190 Cal.App.4th 939, 948 ["a petitioning party's conduct in stretching out the litigation process itself may cause prejudice by depriving the other party of the advantages of arbitration as an 'expedient, efficient and cost-effective method to resolve disputes' "]; *Lewis v. Fletcher Jones Motor*

Cars, Inc. (2012) 205 Cal.App.4th 436, 445 [stating rule that a party who does not demand arbitration within a reasonable time may be deemed to have waived the right to arbitration].)

The determination of waiver is generally a question of fact, and the trial court's finding, if supported by sufficient evidence, is binding on the appellate court. (*St. Agnes Medical Center*, *supra*, 31 Cal.4th at p. 1196.) " 'When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law and the reviewing court is not bound by the trial court's ruling.' [Citation.]" (*Ibid*.)

In the present case, the trial court denied the petition to compel arbitration based on defendant's unreasonable two-year delay combined with defendant's extensive litigation of the matter prior to finally filing a petition for arbitration. In the two-year period after plaintiff's complaint was filed, while presumably knowing all along about the CBA's arbitration provision, defendant proceeded to file multiple motions in court including demurrers, motions to strike, motions for protective orders and a summary judgment motion. Each of these motions required opposition to be filed by plaintiff, inevitably resulting in the expenditure of considerable time and expense on plaintiff's part. Moreover, plaintiff points out (and the record reflects) that plaintiff's attempts at obtaining discovery were met with considerable opposition and objections from defendant, requiring plaintiff to file multiple extensive motions to compel further discovery responses, while also having to file oppositions to defendant's motions for protective orders. In light of this extensive litigation activity on defendant's part and the two-year delay in pursuing arbitration, the trial court concluded: "It is difficult to see how, in the absence of an explanation, the delay in bringing the petition is not unreasonable."

We agree with the trial court's conclusion. Under all the circumstances, defendant's long delay and litigation undertakings were inconsistent with an intent to invoke the CBA's arbitration provision. Instead of petitioning for arbitration early in the

case, defendant deliberately chose to engage in a series of pleading attacks and to wage obstructive discovery battles in the judicial forum for a full two years. Defendant also filed a motion for summary judgment. The end result of these litigation tactics—in terms of the substantial time, effort and expense involved—has taken the dispute far from the speedy, streamlined and inexpensive process that arbitration is supposed to be. In short, defendant's burdensome and dilatory conduct has impaired plaintiff's ability to realize the benefits of arbitration.

More than that, as was noted by *Adolph v. Coastal Auto Sales, Inc.*, *supra*, 184 Cal.App.4th at page 1446, in its affirmance of a trial court's finding that arbitration had been waived: "A defendant may not use court proceedings for its own purposes, while remaining uncooperative with a plaintiff's efforts to use those same court proceedings, and then, upon failing to achieve defendant's own objectives in court, and at the time when parties should be engaged in final trial preparation, demand arbitration for the first time." Here, similarly, when defendant eventually raised the existence of the CBA arbitration provision in earnest it was within the context of its summary judgment motion in the trial court, where defendant's sole purpose was not to obtain arbitration but to terminate the entire action via judicial litigation of a defense. On another occasion, when defendant asserted the existence of the CBA arbitration provision as one of many grounds for seeking a discovery protective order, the trial court denied relief on that ground because defendant had never actually petitioned for arbitration. It appears that it was only when these litigation strategies proved unsuccessful that defendant finally changed course from seeking the tactical advantages of litigation in court to filing its petition to compel arbitration.

Finally, as noted in plaintiff's brief as respondent herein, plaintiff's counsel had sent a prelawsuit letter to defendant requesting various employment-related information including any arbitration agreements signed by plaintiff or other dispute resolution policies. The response from defendant did not include a copy of, or any reference to, the

CBA's arbitration provision. While it is true that, strictly speaking, plaintiff did not sign the CBA, the spirit of plaintiff's prelawsuit letter was evidently to learn of the existence of any claimed arbitration agreements. If defendant had a genuine intention to pursue arbitration, the prelawsuit letter from plaintiff's counsel clearly presented an early opportunity for defendant to inform plaintiff of the purported CBA and its arbitration provision. However, consistent with its subsequent litigation conduct and delay, defendant did not do so.

Under all the circumstances, we conclude that substantial evidence supported the trial court's finding of waiver. Defendant's extensive litigation over a period of two years, when viewed in its nature and entirety, in combination with the substantial delay and expense thereof, was inconsistent with an intent to pursue arbitration and was prejudicial to plaintiff's ability to obtain any meaningful benefits of arbitration. Therefore, we affirm the trial court's finding that defendant waived any right it may have had to obtain arbitration of the parties' dispute under the CBA arbitration provision.

IV. Evidentiary Rulings and Other Matters

In denying defendant's motion for summary judgment and petition to compel arbitration, the trial court found in each instance that defendant had failed to present an adequate evidentiary foundation to substantiate that the asserted CBA was what it was purported to be and that it applied to plaintiff's employment. This basic failure of proof by defendant, as the moving party, was one of the grounds upon which both motions were denied by the trial court. On appeal, defendant claims the trial court erred because, allegedly, defendant presented adequate foundational evidence to show the existence and applicability of the CBA. We address these evidentiary rulings below, and then shall note one additional issue.

A. Evidentiary Rulings in Summary Judgment Motion

In the summary judgment motion, defendant sought to authenticate an attached copy of a CBA by submitting the declaration of Anthony Rangbar, who identified himself

as plaintiff's immediate supervisor and defendant's maintenance manager. Rangbar's declaration asserted that plaintiff was employed as a plant mechanic and was governed by the terms of the CBA attached to the declaration. However, as the trial court noted, the attached CBA appeared to be effective for the period from August 7, 2013 through March 31, 2017; whereas, plaintiff's employment was in 2012. Moreover, the trial court found that Rangbar's declaration did not set forth adequate foundational facts or personal knowledge to support his conclusory assertions about the existence and applicability of the attached CBA. Accordingly, the trial court sustained plaintiff's objections to Rangbar's declaration, concluding that defendant had failed to meet "its burden of production by producing evidence to show that Plaintiff was subject to a grievance procedure contained in the CBA."

The disputed evidentiary ruling is reviewed under the abuse of discretion standard. (*Alexander v. Scripps Memorial Hospital La Jolla, supra,* 23 Cal.App.5th at p. 226.) We conclude the trial court did not abuse its discretion in sustaining the objection to Rangbar's declaration submitted in support of defendant's summary judgment motion. The CBA's authenticity and its applicability to plaintiff's employment required a prima facie showing of proof. (See *Ruiz v. Moss Bros. Auto Group, Inc*. (2014) 232 Cal.App.4th 836, 841–844 [a written agreement, like other writings, must be authenticated before its contents may be received into evidence]; Evid. Code, § 1400 [authentication of a writing means the introduction of evidence "sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is"].) Furthermore, matters stated in a declaration must be based on personal knowledge. (Code Civ. Proc., § 437c, subd. (d).) Here, Rangbar's declaration simply asserted in a conclusory fashion that the attached CBA was in effect and governed plaintiff's employment, but no foundational basis for this knowledge was stated. We conclude the trial court properly sustained the objection.

To overcome this deficiency of proof, defendant attempted to present new evidence in its reply papers to substantiate the existence and applicability of the CBA. The new evidence was the declaration of Eric Vollmer, defendant's human resources manager. The trial court did not consider defendant's reply evidence, and defendant claims that its failure to do so constituted error. We disagree. The inclusion of new evidence with the reply papers is ordinarily not allowed in the context of a summary judgment motion, except in rare or exceptional cases in the trial court's discretion. (*Jay v. Mahaffey, supra,* 218 Cal.App.4th 1522, 1537–1538; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 252.) Defendant has failed to demonstrate the trial court abused its discretion in failing to consider the new evidence presented in defendant's reply.

Based on the foregoing, we conclude the trial court correctly denied defendant's motion for summary judgment on the ground that defendant failed to prove the existence of the CBA and/or its applicability to plaintiff. This ground would be in addition to other grounds noted hereinabove.

B. Evidentiary Ruling in Petition to Compel Arbitration

In support of its petition to compel arbitration, defendant submitted another declaration by Rangbar, this one setting forth additional facts. As noted, the trial court denied the petition on several grounds, including that defendant again failed to meet its burden of showing an applicable arbitration agreement. The trial court explained that Rangbar's declaration in support of the petition "does not contain any explanation for why he would know whether the CBA would cover [plaintiff] or that he would have any knowledge that the copy attached to the declaration is the true and correct copy." Defendant claims the trial court erred on that point.

Rangbar's declaration filed in connection with the petition to compel arbitration asserted that he knew the attached CBA covered plant mechanics including plaintiff because he, Rangbar, was and is the supervisor of plant mechanics working for defendant

and, as their supervisor, he is aware that the plant mechanics are unionized with the Teamsters Union Local 431 and that a CBA exists, which he has had to read from time to time in carrying out his supervisorial duties. Because in the course of his management responsibilities he must refer to the CBA from time to time, he has become familiar with its terms and believes the attached copy to be a true and correct copy in effect during plaintiff's employment.

Does this adequately authenticate the CBA and show that it was applicable to plaintiff? Since the declaration showed at least some foundational grounds upon which the declarant would have personal knowledge of the CBA and its contents, we think it was arguably minimally sufficient. But even if the trial court erred in ruling that the declaration was insufficient to authenticate the CBA, no reversible or prejudicial error has been shown because of the other clear and persuasive grounds for affirming the trial court's denial of the petition as discussed in this opinion, including (i) the failure to show the arbitration provision clearly and unmistakably applied to statutory claims and (ii) waiver.

C. Unconscionability

Finally, plaintiff argues that, in the event we decide the trial court's orders denying the petition to compel arbitration and denying the motion for summary judgment cannot be upheld on any of the other grounds, we should nonetheless affirm the trial court's orders because the arbitration provision in the CBA is so one-sided and unfair that it is *unconscionable*. We need not consider the question of whether the arbitration provision is unconscionable, because we have concluded that other compelling grounds exist for affirming the trial court's orders.

DISPOSITION

The orders denying the motion for summary judgment and the petition to compel arbitration are affirmed. Costs on appeal are awarded to plaintiff.

_____
LEVY, Acting P.J.

WE CONCUR:

_____
FRANSON, J.

_____
DE SANTOS, J.